Supreme Court, U.S.
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No. 97-643

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

VICKIE S. CABRALES

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In our opening brief we explain that for purposes of the relevant venue provisions, the offense of money laundering is "committed" in, *inter alia*, the district where the laundered funds are unlawfully acquired. Respondent's principal argument is that the unlawful generation of the funds—while concededly "an element of money laundering"—"is an 'attendant circumstance' element or 'predicate circumstance', not a part of the *act* element." Resp. Br. 35. She contends that "[v]enue must be based on the 'actus reus' element of the crime" and "cannot be based on the locality (if one exists) of any of the other elements of the offense, *i.e.*, 'attendant circumstance' elements." Resp. Br. 23. Respondent's reliance on an "attendant circumstances" test finds no support in this Court's

cases, and neither it nor the variations of it she proposes provide a sound and workable rule for determining where a crime is committed for purposes of laying venue.

A. Under The Relevant Constitutional And Statutory Provisions, Venue In A Criminal Prosecution Is Not Limited To The District Or Districts In Which The Defendant Personally Committed An Unlawful Act

It is not altogether clear how respondent would distinguish the "attendant circumstances" of a criminal offense from the "acts" that constitute the crime. The narcotics trafficking that is alleged to have generated the funds at issue in this case plainly constitutes "acts." Those acts, moreover, are integral to the crime of money laundering, since exposure (and thus prevention) of the predicate "specified unlawful activity" is the central objective of the money laundering prohibition. In characterizing the unlawful origin of the funds as an "attendant circumstance" rather than as part of the "actus reus," respondent appears to mean only that the defendant in a money laundering prosecution need not be shown to have *personally* committed the underlying narcotics crimes. See Resp. Br. 8 n.1 ("This Court's precedent strongly supports the notion that it is the acts—and only the acts—of the defendant for which he is being punished that will confer venue in a certain district.").

That view cannot be reconciled with this Court's precedents. As we explain in our opening brief, decisions of this Court and the courts of appeals have identified two principal bases for finding that a criminal offense was "committed," for purposes of the relevant venue provisions, in a district where the

defendant is not alleged to have personally committed any criminal act. Those decisions establish that a federal criminal prosecution may be brought in the district where (1) the defendant's confederates committed illicit acts that may fairly be attributed to the defendant, or (2) the effects of the defendant's misconduct are felt. See Gov't Br. 19-22. Both of those principles support prosecution of respondent in the Western District of Missouri.[1]

1. Where a defendant's criminal acts are performed in concert with other wrongdoers, he may be prosecuted in the district where a confederate committed an element of the charged offense. Thus, a defendant may be prosecuted for conspiracy in any district where a co-conspirator committed an overt act in furtherance of the conspiracy; an aider and abettor may similarly be prosecuted in the district where the principal committed the substantive offense. See Gov't Br. 20-21 & nn.9-10. Although trial in such a district

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[1] As we explain in our opening brief, a criminal offense is typically defined by reference to its elements and should, as a general matter, be regarded as having been "committed" in every district where conduct establishing an element of the offense occurs. Gov't Br. 15-16. Respondent's efforts (see, *e.g.*, Resp. Br. 17-20, 28-29) to identify isolated federal statutes for which the location of a particular element would not be an appropriate site for trial do not cast doubt on the validity of that general proposition. In any event, respondent provides no sound basis for concluding that venue in a money laundering prosecution is improper in the district where the "specified unlawful activity" took place, given that prosecution in that district (1) substantially furthers the purposes of the relevant constitutional and statutory provisions, and (2) is consistent with this Court's decisions holding that criminal charges may be brought where the defendant's confederates acted or where the effects of his conduct were felt.

may be less convenient for the defendant than trial at the site of his own misconduct, it exposes him to no fundamental unfairness. By choosing to act in combination with other wrongdoers, an individual assumes the risk that their actions will, for various purposes—including the determination of proper venue—be attributed to him. See *Hyde* v. *United States*, 225 U.S. 347, 362-364 (1912).[2]

Respondent acknowledges, and appears to accept, the application of that rule to conspiracy and aiding and abetting offenses. See Resp. Br. 8 n.1, 10 n.2 ("Courts have reasoned that the defendant's own act —that of agreeing or signing on to the conspiracy or the organization—incorporates by reference the acts of others and makes him vicariously liable for them.") (citing *Hyde*). She contends, however, that "[i]n the money laundering context * * * there is no act by the defendant that signals agreement with the underlying crimes, even though they may be predicates for

[2] As respondent points out (see Resp. Br. 7-8, 12), two of this Court's decisions contain dicta that, read in isolation, might suggest that venue in a federal criminal prosecution is proper only at the site of the defendant's own misconduct. See *Johnston* v. *United States*, 351 U.S. 215, 220 (1956) (place where a crime is committed "is determined by the acts of the accused that violate a statute"); *United States* v. *Anderson*, 328 U.S. 699, 705 (1946) (determination of proper venue depends in part on "what acts of the defendant constituted the violation"). The Court in those cases had no occasion, however, to address the situation in which a defendant's liability under a criminal statute depends in part upon the commission of unlawful acts by another person. The decision in *Hyde* directly addresses that question and concludes that a defendant may properly be subjected to prosecution in the district where his co-conspirators committed overt acts in furtherance of the conspiracy. 225 U.S. at 356-367; see Gov't Br. 20-21.

the charged crime." Resp. Br. 10 n.2. That is incorrect. The money laundering offenses described in 18 U.S.C. 1956(a)(1)(B)(ii) and 1957(a) require the government to prove *both* that the funds in question were the product of "specified unlawful activity," *and* that the defendant knew the funds to have been unlawfully derived. See Gov't Br. 5. The evident purpose and effect of money laundering, moreover, is to facilitate the profitable commission of the predicate crimes. See Gov't Br. 16-17. An individual who commits the crime of money laundering therefore sufficiently "signals agreement with the underlying crimes" (Resp. Br. 10 n.2) that she can fairly be compelled to stand trial at the location where the predicate "specified unlawful activity" occurred.[3]

2. Where a criminal offense consists of setting in motion a chain of events culminating in harmful

[3] For essentially the same reasons, we disagree with respondent's contention (see Resp. Br. 17) that a prosecution for receipt of stolen goods (see 18 U.S.C. 2315) must be brought in the district where the goods were received rather than in the district where they were stolen. Respondent's reliance (see Resp. Br. 17 n.16) on *United States* v. *Bozza*, 365 F.2d 206, 220-221 (2d Cir. 1966), is misplaced. The court in *Bozza* held that the offense of receiving stolen stamps could not be prosecuted in the district where the defendant made and received telephone calls during which he agreed to purchase the stolen stamps and negotiated about their price. *Id.* at 220. Although the court in dictum characterized receipt of stolen goods as a "single step" crime, see *id.* at 221, it did not address the question whether the offense could be prosecuted in the district where the goods were stolen. To our knowledge, the only court of appeals to address that question has held that a prosecution under Section 2315 *may* be brought in the district where the theft occurred. *United States* v. *Melia*, 741 F.2d 70, 71-72 (4th Cir. 1984), cert. denied, 471 U.S. 1135 (1985).

effects at a distant site, the defendant may frequently be subject to prosecution in the district where those effects occur. That principle applies, for example, to offenses involving the use of the mails, as well as to prosecutions for obstruction of judicial proceedings or obstruction of interstate commerce. See Gov't Br. 19-20 & nn.7-8. As this Court recognized in *United States* v. *Johnson*, 323 U.S. 273, 275 (1944), "Congress may * * * provide that the locality of a crime shall extend over the whole area through which force propelled by an offender operates."

Prosecution of respondent in the Western District of Missouri is appropriate for analogous reasons. In the instant case, respondent is not charged with having *caused* the underlying narcotics crimes to occur. The *effects* of her offense were nevertheless felt in the Western District of Missouri, since the evil of money laundering consists precisely of its capacity to conceal, and thus facilitate, the predicate "specified unlawful activity." See Gov't Br. 16-17.

Respondent does not appear to dispute the proposition that criminal offenses may sometimes be prosecuted in the district where their harmful effects are felt, even where that is not the site of the defendant's own conduct. She argues, however, that because the crime of money laundering involves "the misuse of financial institutions and vehicles," the district in which the prohibited financial transactions occurred "has a much stronger interest in prosecuting the money laundering charge." Resp. Br. 43. That contention is without merit. The transactions forbidden by the money laundering statutes represent a "misuse" of financial institutions not so much because they can be expected to cause harm to the institutions themselves, but primarily because they serve to

facilitate the profitable commission of the predicate crimes. The harmful effects of violations of the money laundering statutes are therefore principally felt in the district where the "specified unlawful activity" occurs.[4]

3. Respondent contends that "an expansive interpretation of venue could lead to needless hardship on the accused who is forced to defend himself far from home and available defense resources." Resp. Br. 39. Respondent does not contend that *this* prosecution suffers from that infirmity—*i.e.*, that trial in the Western District of Missouri would require her to defend herself "far from home." To the contrary, the materials submitted to the district court indicate that respondent's overall contacts with the Western District of Missouri have been far more extensive than her contacts with Florida.[5]

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[4] The passage from the Senate Report on which respondent relies (see Resp. Br. 21 n.24, 43) does not suggest that the financial institutions through which the proceeds of criminal activity are laundered are properly regarded as victims of the laundering activities. To the contrary, it treats the professionals involved as accomplices in those activities. See S. Rep. No. 433, 99th Cong., 2d Sess. 4 (1986) ("Most disturbing is the increasing willingness of a few dishonest attorneys, accountants, and bankers to participate in these sophisticated schemes.").

[5] As we explain in our opening brief (see Gov't Br. 6 n.1), respondent's mother, brother, and husband were convicted in October 1992 of participating in a cocaine distribution conspiracy operating in the Western District of Missouri. The evidence presented at the trial of those individuals indicated that respondent lived with her husband in Jefferson City, Missouri, during the period when the conspiracy was in operation. See Gov't Response in Opposition to Defendant's Motion to Dismiss for Lack of Proper Venue, Attach. B, at 2 (filed June 4, 1996). In the district court proceedings in the instant

The more fundamental flaw in respondent's argument, however, is that the relevant constitutional and statutory venue provisions were never intended to guarantee a criminal defendant a right to be tried in the district of his residence. "[T]he geography prescribed" by the applicable venue provisions "is the district or districts within which the offense is committed," which "may or may not be the place where the defendant resides." *United States* v. *Anderson*, 328 U.S. 699, 705 (1946) (footnote omitted). Accord, *e.g.*, *Johnston* v. *United States*, 351 U.S. 215, 220-221 (1956) (constitutional venue and vicinage provisions "state[] the public policy that fixes the situs of the trial in the vicinage of the crime rather than the residence of the accused"). Rather, the requirement that a criminal offense be prosecuted in the State and district where it was committed serves (1) to increase the likelihood that relevant evidence can be discovered and presented at trial and (2) to enhance the ability of the community most directly affected by criminal conduct to observe and (through the jury) to participate in the administration of the criminal law. To permit money laundering offenses to be tried at the site of the "specified unlawful activity"—and, more generally, to permit criminal charges to be

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case, respondent submitted an affidavit stating that she lived in Florida from January 22, 1991, to January 28, 1991 (the period immediately surrounding the financial transactions alleged in the indictment, see Pet. App. 19a-20a), and that she had no contact with the Western District of Missouri during that seven-day period. See Affidavit of Vicki Cabrales in Support of Her Motion to Dismiss for Lack of Proper Venue (filed May 2, 1996). Respondent has not otherwise claimed to be a Florida resident or denied her substantial and longstanding contacts with the Western District of Missouri.

brought in the district where a defendant's confederates acted, or where the harmful effects of his crime are felt—substantially furthers those purposes. See Gov't Br. 23-28.[6]

As we explain in our opening brief (Gov't Br. 26), the rule adopted by the Eighth Circuit in this case may impair the efficient conduct of federal money laundering prosecutions, particularly in cases where the government seeks to try money laundering counts together with charges for the substantive criminal offenses that generated the tainted funds. Respondent contends that convenience to the government is an irrelevant consideration, on the ground

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[6] Respondent observes that "the government is not required to prove, in connection with a money laundering offense, the particular acts that constituted the specified unlawful activity." Resp. Br. 31. There are a variety of ways in which the government can prove that particular funds were derived from "specified unlawful activity." If the government proves that element in a manner that does not establish the location of the predicate crimes, it will presumably be required to bring the money laundering prosecution in the district where the financial transactions occurred. The fact that a money laundering prosecution will not *always* establish the situs of the "specified unlawful activity" does not, however, preclude the government from laying venue on that basis when the evidence *does* make clear where the predicate crimes occurred.

Congress has, for example, provided that an offense involving the use of the mails "may be inquired of and prosecuted in any district from, through, or into which" the mailing travels. 18 U.S.C. 3237(a). Section 3237(a) does not require the government to introduce proof of every district through which the mailed object has moved in order to obtain a conviction for illicit use of the mails. It simply provides that venue is proper in an intermediate district *if* the government chooses to present evidence that the mailing traveled through that district. The same principle applies here.

that "[m]any constitutional guarantees for criminal defendants are inefficient and costly." Resp. Br. 41 (quoting *United States* v. *Palma-Ruedas*, 121 F.3d 841, 850 (3d Cir. 1997), petition for cert. pending *sub nom. United States* v. *Rodriguez-Moreno*, No. 97-1139). The analysis to which respondent objects, however, finds clear support in this Court's decisions. In *Hyde*, the Court observed:

> It is not an oppression in the law to accept the place where an unlawful purpose is attempted to be executed as the place of its punishment, and rather conspirators be taken from their homes than the victims and witnesses of the conspiracy be taken from theirs. We must not, in too great a solicitude for the criminal, give him a kind of immunity from punishment because of the difficulty in convicting him * * *.

225 U.S. at 363. The Court thus recognized that although the pertinent venue rules are principally designed to protect the interests of the criminal defendant, they should not be construed in such a manner as to undermine the legitimate interests of the government and the victimized community. See also, *e.g.*, *United States* v. *Cores*, 356 U.S. 405, 409-410 (1958) ("It is hardly likely that the Congress would create the new sanction only to strip it of much of its effectiveness by compelling trial in the district where the crewman was present when his permit expired—a place which months or years later might well be impossible of proof.").[7]

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[7] Respondent notes that under the government's theory, "[a] money launderer who spent his whole life in New York, processing cash for a variety of criminal enterprises, about whose extent, location, and criminal acts he is unaware, * * * could be prosecuted wherever the 'dirty' money came from, which may be a variety of different places." Resp. Br. 39-40. That is the logical consequence of our position, but we see no impropriety in such a proceeding. An individual who holds himself out as a "full service" money launderer thereby assumes the risk of prosecution wherever the laundered funds turn out to have been generated. In such a case, the defendant's desire to be tried at the place of his residence (or at the place where his own criminal acts took place) is an insufficient basis for requiring the government to present in New York its evidence of "specified unlawful activity" occurring in other jurisdictions. Cf. *Hyde*, 225 U.S. at 363 ("rather conspirators be taken from their homes than the victims and witnesses of the conspiracy be taken from theirs").

B. The Tests For Determining Venue Proposed By Respondent Would Not Yield Coherent Or Predictable Results, And They Are Not Supported By This Court's Precedents

1. Respondent contends that the Western District of Missouri is not a proper venue for this prosecution because the illicit origin of the funds in question is an "attendant circumstance" of money laundering rather than part of the "actus reus." She acknowledges, however, albeit reluctantly, that in *some* circumstances a criminal prosecution may appropriately be brought in a district where a person other than the defendant performed an element of the charged offense. See Resp. Br. 8 n.1 & 9-10 n.2; see also pp. 3-5, *supra*; Gov't Br. 20-21 & nn.9-10. Having made that concession, respondent offers no principled basis—and certainly no mode of inquiry that offers the assurance of a bright-line rule—for differentiating elements that are part of the "actus reus" of the charged offense from elements that are part of its "attendant circumstances." Indeed, although respon-

dent treats the distinction between "actus reus" and "attendant circumstances" as though it were an established formula, she cites *no* case in which a court has relied on that distinction in resolving a question of venue.

2. Respondent also suggests (Resp. Br. 14-16, 23, 29) that a venue analysis focusing on the "key verbs" of a federal criminal statute will yield coherent and predictable results. Contrary to respondent's contention, rigid application of a "key verbs" analysis will lead to surprising and anomalous outcomes. See *United States* v. *Palma-Ruedas*, 121 F.3d 841, 863-864 (3d Cir. 1997) (Alito, J., dissenting), petition for cert. pending *sub nom. United States* v. *Rodriguez-Moreno*, No. 97-1139. The determination of proper venue, this Court has recognized, turns on "the nature of the crime alleged and the location of the act or acts constituting it." *Anderson*, 328 U.S. at 703. Consideration of the active verbs in the relevant criminal statute may be a useful step in the analysis, but there is no basis in logic or in this Court's decisions for treating it as the whole of the inquiry.[8] Rather than looking solely to the statutory verbs, courts should undertake a realistic appraisal of the "nature of the crime" defined by the statute.

[8] See *Palma-Ruedas*, 121 F.3d at 860, 862 (Alito, J., dissenting) (observing that "[t]he Supreme Court has never embraced the 'verb test,'" explaining that the application of constitutional venue provisions should not turn on whether Congress defines the offense through verbs or other grammatical forms, and stating that "while the 'verb test' may provide a useful first cut at determining venue, there are complicated crimes for which a rigid grammar-based test may not be appropriate").

3. Finally, respondent proposes a theory of what constitutes a "continuing offense" for purposes of the general federal venue statute that, in her view, renders venue improper in this case. Under applicable venue statutes, unless Congress specifies a different venue rule for a particular crime, "any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed." 18 U.S.C. 3237(a). As we explain in our opening brief (see Gov't Br. 15-16), the offense of money laundering is "begun" with the generation of funds through "specified unlawful activity," and it is therefore subject to prosecution in the district where the predicate crime occurs.

Respondent disputes that analysis, arguing that "[t]he crime of money laundering 'begins' when the financial transaction is undertaken, not when the separate underlying crime occurs." Resp. Br. 34. She asserts more generally that "a true 'continuing offense' begins where the defendant has taken all actions necessary to be prosecuted (the crime is complete) and ends where the defendant discontinues his actions." Resp. Br. 37. It is far more natural, however, to say that a multi-element offense is "begun" in the district where the *first* of its elements occurs. Respondent's construction of Section 3237(a) cannot be reconciled with this Court's recognition that "where a crime consists of distinct parts which have different localities the whole may be tried where any part can be proved to have been done." *United States* v. *Lombardo*, 241 U.S. 73, 77 (1916).

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For the reasons stated above, and in the opening brief for the United States, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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